

Lobbyist Random Audit Guidelines

Preface

The Tennessee Comprehensive Governmental Ethics Reform Act of 2006 (“Act”) gives the Tennessee Ethics Commission (“Commission”) the power to conduct audits.¹ In addition, the Act provides that it is the “duty” of the Commission to “[a]udit each year the registration statements, amendments to registration statements and reports of no more than four percent (4%) of all lobbyists” to determine compliance with the Act.² The lobbyists are selected randomly, in the presence of a representative of the Office of the Attorney General and Reporter.

These guidelines were prepared by Commission staff with the purpose of helping lobbyists who have been selected for random audit and are preparing to respond to requests for information. In addition, the guidelines are intended to be helpful to all lobbyists in determining what sort of records should be maintained to show compliance with the Act. The guidelines have not, however, been reviewed or approved by the Commission. A person wishing to rely on legal advice from the Commission on a specific legal question must seek an informal response from legal staff or an advisory opinion from the Commission.³

Scope of Random Audit

An audit of the lobbyist registration statement includes a verification of information listed in the statement, including a list of the subjects of lobbying, the name and address of any family member who is a state official, and the extent of any business arrangement with any candidate or state official.⁴ All this information is subject to verification by random audit. In addition, the Act provides that the lobbyist’s “employment contract, job description or other documentation” shall be examined to determine whether a prohibited contingency fee arrangement is included, and whether the date of employment is “consistent with” the registration statements filed by the lobbyist and employers.⁵

¹ Tenn Code Ann. § 3-6-107(2).

² “[I]t is the duty of the ethics commission to: . . . Audit each year the registration statements, amendments to registration statements and reports of no more than four percent (4%) of all lobbyists.” Tenn. Code Ann. § 3-6-308(a)(7).

³ Informal responses can only be given when the Act or relevant advisory opinions are clear on the issue raised, and not subject to interpretation. Informal responses are subject to review and modification by the Commission. Any lobbyist or employer wishing to obtain a written advisory opinion from the Commission should send a written request to the Executive Director.

⁴ Tenn. Code Ann. § 3-6-302(b).

⁵ Tenn. Code Ann. § 3-6-301(4)(A)(definition of “random audit information”).

“Reports” subject to audit include cost reports on all-legislature in-state events in which the lobbyist participated, as well as reports on lobbyist compensation filed by employers. Finally, the Act specifically provides that “total lobbying and lobbying-related compensation and expenses paid to the lobbyist by an employer” are to be “checked against the range of expenditures reported by the employer.”⁶

Time frame. Absent unusual circumstances, the documents subject to audit are those which have been on file with the Commission less than two (2) years as of the time of the audit.⁷ Thus, if a lobbyist is randomly selected for audit in June 2009, the Commission will audit statements filed from July 2007 through the date of completion of the audit.

Audit objectives. The overall objective of the audit is to determine whether the statements, amendments, and reports filed concerning the lobbyist in the audit year and the preceding year were timely, accurate, complete, and otherwise in compliance with the Act. In order to achieve this objective, the auditor usually seeks to determine the following:

1. Whether the information in the registration statement is complete and accurate.
2. Whether the lobbyist and his or her employer(s) registered timely;
3. Whether the lobbyist’s compensation agreements comply with the prohibition against any fee contingent on success in the eyes of the employer;
4. Whether the compensation reported by the employer(s) for the six (6) month period from April 1 through September 30 of the previous calendar year, and for the six (6) months from October 1 of the previous calendar year through March 31 of the year of the audit, correlated with the compensation received by the lobbyist;

⁶ Tenn. Code Ann. § 3-6-301(4)(A).

⁷ “[I]nformation contained in statements filed with the commission for more than two (2) years shall not serve as the basis for a random audit.” Tenn. Code Ann. § 3-6-301(4)(A)(internal citation to Tenn. Code Ann. § 3-6-105(a)(5) omitted). Tenn. Code Ann. § 3-6-308(a)(6) also provides, with regard to filings by lobbyists and employers, “[f]ilings older than two (2) years shall be deemed to be sufficient, absent a showing of fraud.”

Tenn. Code Ann. § 3-6-308(a)(7) provides, in pertinent part, as follows:

Nothing contained within the provisions of this subdivision (a)(7) shall be construed to prevent the commission, upon finding probable cause to believe that an employer or a lobbyist has violated the provisions of this part, from auditing the registration statements, amendments to registration statements and reports of the employer or lobbyist.

Tenn. Code Ann. § 3-6-106(a)(5) provides:

Statements filed with the commission for more than two (2) years shall be deemed to be sufficient, absent a showing of fraud or the existence of an ongoing investigation related to the statement.

5. Whether the lobbyist attended and paid for the required annual training for the previous calendar year and has either attendee and paid for, or made plans to attend and pay for, training in the year of the audit; and,
6. Whether in-state all-legislature events that the lobbyist gave or participated in during the two years preceding the audit were in compliance with the Act's requirements.

Depending on the circumstances, the audit may include other objectives based on the statutory authority mentioned above.

Compliance Standards and Records

1. Registration statement. Lobbyist registration statements are required to include contact information for the lobbyist and the employer and the name and address of any family member who is a state official. The statements must also contain a list of subject matters lobbied for each employer and a disclosure of the extent of any business arrangement between the lobbyist and any candidate or state official.⁸

Records: The employment agreement, if it specifies the subject matters, can be used to verify the statement on the registration. If the agreement is oral, the lobbyist may want to retain contemporaneous notes on the subjects lobbied. Any employment records regarding family members who are state officials should be retained, as well as any writing or notes reflecting any business arrangement between the lobbyist and any candidate or state official.

2. Timeliness of registration. A lobbyist is required to register within seven (7) days of entering into an agreement to provide lobbying services, regardless of when the lobbyist actually engages in lobbying.⁹ Lobbyists should retain a copy of any written employment agreement and ensure that they register with seven (7) days of entering into the agreement. In-house lobbyists generally have a continuing agreement to lobby for their employer. Thus, legally, they enter into such an arrangement on the first day of each registration period during which they are still employed. Since the registration period is based on the calendar year, all in-house lobbyists who continue to be employed must register within seven (7) days of January 1.

Records: If the agreement is oral, the lobbyist should retain contact information regarding the person with whom the agreement was made, and a record of when the agreement was entered into. The auditor may contact the other parties to such agreements to verify terms and dates.

3. Contingency fee. The Act provides that no employer may pay, and no lobbyist may accept, any fee, compensation or bonus for lobbying "wherein the amount of the . . .

⁸ Tenn. Code Ann. § 3-6-302(b).

⁹ Tenn. Code Ann. § 3-6-302(a)(2). See Op. Tenn. Ethics Comm'n, No. 06-01 (Dec. 12, 2006).

compensation . . . is contingent upon achievement of an outcome deemed to be successful for the employer.”¹⁰

Records: *Contract lobbyists* should provide copies of all written contracts, documentation describing the terms of any oral agreements, copies of any correspondence from the lobbyist to the employer clarifying that no contingent compensation based on success can be accepted, and documentation of the reasons for any bonus or supplement received.¹¹ *In-house lobbyists* should provide copies of the job description and employment agreement, as well as documentation showing the reason for any bonus or supplement received.¹² Such documents provided to the Commission in conjunction with a random audit are not public record and are confidential as provided by the Act.¹³

4. Compensation for lobbying and related expenses. Each employer is required to report, for each six (6) month period, “the aggregate total amount of lobbyist compensation paid by the employer”¹⁴ and the total of all expenditures for any in-state all-legislature events.¹⁵ These reports are filed in May and November for the six (6) month period ending on March 31 and September 30, respectively. The Act specifically provides that “total lobbying and lobbying-related compensation and expenses paid to the lobbyist by an employer” are to be “checked against the range of expenditures reported by the employer.”¹⁶

In order to ensure compliance, employers and lobbyists should note that the time periods for employer disclosure of lobbying compensation and related expenses do not coincide with the calendar year. Thus, if an employer registers for calendar year 2008 in January, it must file three (3) lobbying expenditure disclosure reports: one for the period from the October 1, 2007 through March 31, 2008 one for April 1 through September 30, 2008, and one for October 1, 2008 through March 31, 2009. The simple fact that the

¹⁰ Tenn. Code Ann. § 3-6-304(k).

¹¹ For example, such a payment to a contract lobbyist may be based on an unanticipated increase in the number of bills or issues which the lobbyist was required to deal with, or in the number of hours necessary to devote to a particular bill or issue.

¹² A bonus payment to an in-house lobbyist for a company whose main business is not lobbying may permissibly be based on the overall performance of the company or on the exceptional quality of work produced, but not on exceptional results (success) achieved in lobbying. To avoid any question of violating this requirement, lobbyists should ensure that the reasons for any bonuses or supplemental payments received are contemporaneously documented.

¹³ Tenn. Code Ann. § 3-6-308(c). “Random audit information” is defined in Tenn. Code Ann. § 3-6-301(4)(A).

¹⁴ Tenn. Code Ann. § 3-6-303(a)(1).

¹⁵ Tenn. Code Ann. § 3-6-303(a)(3).

¹⁶ Tenn. Code Ann. § 3-6-301(4)(A).

employment relationship has been terminated does not release the employer from filing the expenditure reports. If a lobbying employment relationship terminates after initial registration, this is an “event, action or changed circumstance that renders the registration statement inaccurate or incomplete.”¹⁷ Under the Act, both the employer and the lobbyist are under an obligation to amend their registration statements to show this fact not later than seven (7) days after it takes place.

In the absence of amendment showing that all lobbyists employed were terminated before the date on which the reporting period commenced, the employer is required to file the compensation disclosure report. The reason is that the Commission and the public cannot simply assume that the reason no report was filed is that the lobbyist was terminated.¹⁸

If an employer enters into lobbying agreements with more than one (1) lobbyist, the “aggregate total amount of lobbyist compensation” cannot be meaningfully compared to the compensation received by the individual lobbyist being audited unless information on the compensation paid to other lobbyists is considered. In these cases, the employer may be asked to confirm the amount of compensation paid to the lobbyist being audited and the total amount paid to all other lobbyists. These amounts, as well as the amount of the lobbyist’s total lobbying compensation from all sources, come within the definition of “random audit information” and are therefore confidential by statute.¹⁹ The amounts are not included in the public audit report and are not subject to public inspection.

For in-house lobbyists, employers must determine the portion of compensation attributable to lobbying. “For purposes of the disclosure, compensation paid to any lobbyist who performs duties for the employer in addition to lobbying and related activities shall be apportioned to reflect the lobbyist’s time allocated for lobbying and related activities in this state.”²⁰ As set forth in the instructions for filing the lobbying expenditure report (SS-8011), “compensation paid to any lobbyist who performs duties for the employer in addition to lobbying and related activities shall be apportioned to reflect the lobbyist’s time allocated for lobbying and related activities in this state.”

The Commission has adopted no rules or guidelines on how to perform such apportionment, but, in practice, any reasonable method should suffice. One reasonable method would be to divide annual average compensation for the period in question in half to reflect the six month period. Time devoted to non-lobbying activities should then be

¹⁷ Tenn. Code Ann. § 3-6-302(c).

¹⁸ If no compensation or expenses were paid, the appropriate range to be reported is “[l]ess than \$10,000.” Tenn. Code Ann. 3-6-303(a)(2)(A).

¹⁹ Tenn. Code Ann. § 3-6-308(c). “Random audit information” is defined in Tenn. Code Ann. § 3-6-301(4)(A).

²⁰ Tenn. Code Ann. § 3-6-303(a)(1).

deducted. If the lobbyist devoted time to lobbying local, municipal, or federal officials, or officials of other states, a further deduction should be made.

Records: Lobbyist compensation and lobbying related expenses can be established by bank records, tax records, receipts, canceled checks and similar documents. Contract lobbyists should also retain records of all expenses paid directly by them in connection with an in-state all-legislature event. *In-house lobbyist* compensation can be shown by job descriptions, evaluations, time sheets, diaries, travel reimbursement documentation showing which days involved lobbying-related travel, telephone logs, calendars, or any other credible record of time allocation.

5. Annual training. The Act provides that “[e]ach lobbyist shall attend one (1) ethics course annually.”²¹ The Commission’s records are consulted to determine compliance.

Records: To avoid problems in the unlikely event that the Commission’s records are incomplete, it is a good idea to retain the receipt for payment and the sign up sheet (or confirmation form if the training was web-based).

6. In state all-legislature events. The Act provides that certain items provided in connection with several types of in-state events are not subject to the general ban against gifts from lobbyists or employers of lobbyists to state officials.²² The only type of in-state event that must be reported to the Commission is one to which invitations are extended to the entire membership of the general assembly. Entertainment, food, refreshments, meals, beverages, or health screenings that are provided in connection with such an event are not subject to the gift ban, provided that certain documents are filed with the Commission and certain other requirements are met.²³ A copy of the invitation must be filed with the Commission at least seven (7) days in advance of the event by the employer or lobbyist paying for the event. The per person “total aggregate cost” and “contractual cost” for the event must be less than fifty-one dollars (\$51), excluding sales tax and gratuity, and the employer or lobbyist must file, within thirty (30) days of the event, a report on these costs.

Records: Documentation of the event and its cost can include: copies of the invitation, the seven (7) day advance notice to the Commission, the list of

²¹ Tenn. Code Ann. 3-6-114(b).

²²The types of events, and the specific items excluded from the ban, are set forth in the following subparagraphs of Tenn. Code Ann. § 3-6-305(b): (8)(entire membership of general assembly: entertainment, food, refreshments, meals, beverages, or health screenings), (9)(candidate or official or immediate family member of candidate or official is a speaker or part of a panel discussion at a scheduled meeting of an established and recognized membership organization that has regular meetings: entertainments food, refreshments, meals, amenities, or beverages), (10)(invitation to an official: food refreshments, meals, or beverages).

²³ Tenn. Code Ann. § 3-6-305(b)(8).

invitees, invoices, canceled checks, credit card statements, responses to invitations, sign in sheets, and attendee lists. If the per person contractual cost of the event is not based upon a written contract with a third party then the lobbyist may be asked to supply attendance records or, if not available, an approximation of the number of actual attendees, or other appropriate documentation which would reasonably tend to validate the per person cost of the in state event.

Random Audit Procedure

The following typical steps of the random audit procedure, from the point of view of the lobbyist, are based on the procedure followed in 2008.

1. Notification of selection. The lobbyist receives written notice from the Executive Director of selection.
2. Questionnaire. The lobbyist receives a questionnaire from staff responsible for the audit. The questionnaire seeks information and documentation regarding the issues to be examined. Information and documentation which comes within the definition of “random audit information” is not public record and is held confidentially by the staff.²⁴
3. Interview. An interview is held at Commission offices on at a mutually convenient date and time.
4. Draft audit report. A draft of the audit report is sent to the lobbyist, who may object or suggest changes within ten (10) days of receipt of the draft.
5. Final audit report. After any necessary changes are made, the final audit report is sent to the lobbyist and posted on the Commission’s website.

Before completion of the final report, Commission staff may request such additional documentation as may be necessary to verify information set forth or required by the registration statement, employer expenditure reports, and cost reports for in-state all-legislature events.

²⁴ Tenn. Code Ann. 3-6-308(c).